was very uncommon and would have allowed the driver no warning of the pending brake failure. The appellant sued the driver and his employers, the respondents. In evidence it was shown that neither the vehicle manufacturers nor the Ministry of Transport recommended the removal of the pipe for inspection, although only 60 per cent. of it was visible *in situ* and the remaining 40 per cent. (in which part of pipe the hole had occurred) was particularly prone, by reason of its position, to corrosion. Evidence also established that the degree and speed of corrosion was largely determined by the use to which the vehicle was put (*e.g.*, type of loads carried, places visited, unusual occurrences). The respondents led no evidence on this subject, however, relying on a plea of latent defect. It was held by the House of Lords (Lord Guest and Viscount Dilhorne dissenting) that the respondents had to prove that, in all the circumstances which they knew or ought to have known, they took all proper steps to avoid danger; they had failed to prove this and accordingly the appellant was entitled to damages.

I have dealt with a large number of authorities in order to illustrate the application of the *maxim, res ipsa loquitur*, and to bring home the point that in a case in which the operation of the principle contained in the *maxim* has been properly invoked the primary and fundamental effect is that there is a case for the defendant to answer. The secondary effect of this principle is that once the burden of proof shifts to the defendant, the mere happening of the accident affords reasonable evidence, in the absence of explanation by the defendant, that it was due to the defendant's negligence. Hence, if the defendant gives no evidence there must be a verdict for the plaintiff.

As regards the nature of onus which rests upon the defendant, counsel for the appellant referred to the view adopted in Australia in the case of *Mummery* v. *Irvings Proprietary Ltd.*,[30] which was applied in the more recent case of the *Nominal Defendant* v. *Haslbauer*,[31] that if the defendant produces a reasonable explanation, equally consistent with negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff. On the other hand, it was held by the Court of Appeal in *Moore* v. *R. Fox & Sons, Ltd.*,[24] in which the *dicta* in various previous cases were discussed, that the onus of disproving negligence lies on the defendant, at least in the sense that it is not sufficient for him to show that there were several hypothetical causes consistent with an absence of negligence, but that he must go further and show either that the accident was due to a specific cause which does not connote his negligence, or that he had used all reasonable care in the matter. Something to the same effect was held by the House of Lords in *Colvilles, Ltd.* v. *Devine*[18] when Lord Guest said that the explanation only carries the defendant half way to success and that the explanation to be available as a defence must be consistent with no negligence on his part. That is the law in England today, even though Lord Upjohn said in the same case that the true ambit of the doctrine of *res ipsa loquitur* may one day require further elucidation, and I have not been able to find any case in which the Privy Council has said anything to the contrary. Even if I were to accept the view adopted in Australia, with which I regret to say I do not agree, the prerequisite for that view is a reasonable explanation by the defendant. What explanation has the defendant given in this case? Absolutely none.

It is contended for the appellant that the findings of the learned trial judge, to which I have referred earlier in my judgment, have no basis in fact. It is said that such facts as were proved showed that the deceased was wholly or partly responsible for the accident. Again, it is said that the judge's inference that the appellant swerved to the left was mere speculation which was not supported by evidence. It is further said that there was no evidence whatever to show where the accident took place or how it took place. And it is lastly said that the learned judge ought to have held that the unexplained happening of an accident where the facts are equally consistent with the negligence of either party, is no ground for inferring negligence on the part of the defendant. I can find no substance in any of these arguments, because what the learned trial judge said in effect was that this was a case of *res ipsa loquitur* and that it was for the defendant to explain how the accident happened, or at least to show that she was in no way guilty of negligence. I can find not an iota of evidence to suggest that the deceased was in any way negligent. If he was, it was for the defendant to prove it, which she chose not to do.

In my judgment, this is as clear a case of *res ipsa loquitur* as was the case of *Yow Fook* v. *Woon Kim Tew*[6] on which the learned trial judge relied for his conclusion that the defendant, having failed to give a reasonable explanation of what occurred, was liable in damages. As the learned trial judge pointed out, the facts in this case are quite similar to the facts in that case. In the circumstances, he had no alternative but to give judgment for the plaintiffs, and I cannot see how that judgment can possibly be challenged.

I would dismiss the appeal with costs.

Suffian Ag. L.P. and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.; Khoo & Sidhu.*

SETAPAK TIN MINES SYNDICATE LTD. & ANOR. v. KHOO NEAN TEE & ORS.

[F.C. (Suffian Ag. L.P., Gill and Ali F.JJ.) June 5, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 107 of 1969]

Landlord and Tenant — Trespassers — National Land Code, 1965, s. 425.

In this case the appellants had in their counterclaim alleged that some of the respondents had occupied the defendant's mining lands illegally and they asked the court to order these respondents to deliver up vacant possession of the lands to them. The learned trial judge found that the

respondents were all squatters but nevertheless he dismissed the counterclaim. The appellants appealed.

Held, allowing the appeal: (1) as the respondents were squatters the appellants should have been given vacant possession of the lands;

(2) section 425 of the National Land Code gives a landowner an additional remedy but it does not prevent him from applying to the court to have unlawful occupiers ejected.

Cases cited in argument:

(1) *Goldsack* v. *Shore* [1951] 1 All E.R. 276.

(2) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260.

(3) *Cooper* v. *Whittingham* (1880) 15 Ch. D. 501.

(4) *Civil Service Co-operative Society* v. *General Steam Navigation Company* [1903] 2 K.B. 756.

FEDERAL COURT.

Abdullah bin Mohamed Yusof for the appellants.

Dato' S. P. Seenivasagam for the respondents.

The judgment of the Federal Court was delivered by:

Suffian Ag. L.P. (read by Gill F.J.): We allowed this appeal and now give our reasons.

There was a claim by the plaintiffs and a counterclaim by the defendants. There were 227 plaintiffs. They were divided into two groups. The first group consists of those persons mentioned in paragraph 7 of the statement of defence, while the second group consists of the others. The counter-claim relates only to the second group.

The defendants alleged in their counter-claim that the second group occupy the defendants' mining lands illegally and asked the court to order the second group to deliver up vacant possession to the defendants.

The defendants gave evidence and the learned trial judge found as a fact that all the plaintiffs, both in the first and second groups, were squatters, but nevertheless he dismissed the counter-claim. It is against this order that this appeal has been brought by the defendants. No order has yet been made on the claim, but Dato' Seenivasagam made nothing of this.

As the second group of plaintiffs were squatters, the defendants should have got vacant possession and so we allowed the appeal.

During the argument before us, Dato' Seenivasagam for the second group of plaintiffs did not dispute that his clients were trespassers, but argued that section 425 of the National Land Code, 1965, precluded the defendants from bringing this counter-claim and that the defendants should first have gone to the collector to get the second group removed from the mining land concerned.

Section 425 reads as follows:

"425. (1) Any person who, without lawful authority —

(a) occupies, or erects any building on, any State land, reserved land or mining land, or

(b) clears, encloses or cultivates any such land or part thereof, or

(c) cuts any timber or produce on any such land, shall be guilty of an offence, and liable on conviction to a fine not exceeding five hundred doilars, or imprisonment for a term not exceeding six months, or to both.

(2) The Collector may —

(a) remove from any land any person whom he has reason to believe to be committing an offence under this section; and

(b) remove any building, or take possession in the name of the State Authority of any crop, erected or cultivated on any land in contravention thereof.

(3) The Collector may call upon any police officer for assistance in the exercise of the powers conferred on him by sub-section (2), and it shall be the duty of every police officer to comply with any such request.

(4) The Collector may deliver to a police officer —

(a) any movable property remaining on land after a person or building has been removed under subsection (2); and

(b) any of the materials composing a building so removed,

and any property or materials so delivered shall be disposed of in accordance with section 43 of the Police Ordinance, 1952."

We do not agree with Dato' Seenivasagam. We are of the opinion that section 425 gives a landowner an additional remedy and that the section does not prevent him from coming straight to the court to have unlawful occupiers ejected and that he does not first have to apply to the Collector to act under that section.

As regards costs, we are of the opinion that the second group of plaintiffs should pay the defendants' costs here and in the court below.

Appeal allowed.

Solicitors: *Skrine & Co.; S. Seenivasagam & Sons.*